Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

KATHERINE G. IVIMEY, and
JOHN R. IVIMEY, SR.,

Petitioners,

v.

AMERICAN BANK OF CONNECTICUT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

Katherine G. Ivimey
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22 pp

QUESTION PRESENTED FOR REVIEW

Whether petitioners were deprived of their rights to a jury trial, as provided in the Seventh Amendment to the Constitution of the United States, in that the trial court ordered the jury to execute a directed verdict against petitioners, prepared by that court, where:

(a) abundant evidence was before the jury, particularly testimony of petitioners' adversary, which testified to facts proving a prima facie case for petitioners on the case's central issue,

(b) the trial court declined to admit testimony of expert witnesses confirming the foregoing facts, on grounds they were not "legal experts," and

(c) the court ruled evidence inadmissible on its own interpretation of the parties' mortgage note.

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STATEMENT OF JURISDICTION

The judgment in the trial court sought to be reviewed was entered on January 15, 1992, and the final motion for reconsideration on appeal was entered in the Connecticut Supreme Court on October 15, 1993.

The statutory provision conferring jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. 1257(a).

The within petition was filed within ninety days, the last day for filing thereby being January 13, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

The principal constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States, as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Involved by reference is the Constitution of the State of Connecticut, the relevant portion of which is as follows:

> Article I, Sec. 19: The right of trial by jury shall remain inviolate,....

STATEMENT OF THE CASE

This case claims in eight counts damages and other alternative remedies arising out of defendant's deceits, breaches, torts and misconduct consequent to its preparation of, and performance under, a mortgage note (hereinafter "note") and Truth-In-Lending Statement. A ninth count also alleges the foregoing acts were fraudulent, where applicable.

Count I alleges the note sets forth an excessive monthly payment and that defendant violated the Federal Truth-In-Lending Act, 15 U.S.C. Secs. 1601-1667(e) and the Connecticut Truth-In-Lending Act, C.G.S Secs. 36-393 through Sec. 36-414.

The note provides for payments in advance (at the beginning of each month), as the trial court affirmed. (Transcript, Jan. 10, 1992, p.18). Petitioners intro-

duced abundant evidence showing the amount of such payments was excessive, because such amount applies only if payments were due in arrears (at the end of each month). Such excess, when compounded at interest over the term of the note, results in an average monthly overcharge of $5.63. The excessive payment was also set forth in the Truth-In-Lending Statements prepared by defendant.

The fact that the payment was excessive was confirmed by defendant's own principal witness, Vice-President Lompert, who testified to the fact that it was his calculation as to the amount of the payment, the fact that he had opportunity to examine the terms and obligations of the note, the fact the book of tables supplied him by his employer, the defendant, to calculate the payment amount pertained to payments in

arrears, not in advance, a regular principal and interest payment, saying, "That is all we are looking for, for the use of these books.", the fact that, as far as advance payments are concerned, such has nothing to do with those books and that the arrears payment book was the source of the payment figure arrived at in his calculations. (Transcript, Jan. 14, 1992, pp. 30-33,36.)

Petitioners also introduced two expert witnesses, one of whom was a vice-president of Financial Publishing Company, the stipulated authority who published the aforesaid book of tables, the other the president of a similar company, whose combined experience spanned sixty-eight years. Both confirmed the foregoing facts, but the court would not admit their testimony on grounds neither was a "legal expert."

Ironically, the court had already made the only relevant "legal" interpretation of the note, namely that it provided for payments in advance. The expert's only function was to exercise their expertise in determining the proper payment amount in view of that interpretation. Instead, the court sought the expert's "legal" opinions. When they stated they could not give such opinions, the court effectively dismissed them and their testimony for that reason, ignoring their proper role.

Notwithstanding the conclusive evidence aforesaid, the trial court ordered the jury to execute a directed verdict for defendant, which the court had prepared, asserting substantively that there was insufficient evidence for the jury to consider. Petitioners' counsel immediately took an oral exception, which was noted

without comment by the court. (Transcript, Jan 15, 1992, p.116.)

The court, moreover, predicated its directed verdict on its assertion that, because the last count of the complaint alleged fraud, the standard of proof applicable to all counts in the complaint was likewise that for fraud, and that

<u>therefore each count requires "...a very heavy burden on the plaintiff to prove the fraud by clear and precise and convincing evidence. So I think that's what the law is."</u> (Transcript, Jan. 15, 1992, pp.70-71)

The court also sought to interpret the terms of the note in such manner as to suppress offered evidence, saying (Transcript, Jan. 15, 1992, pp.29-30):

> Well, anyway, from what I've heard this schedule apparently is in conflict with the terms of the note, so therefore I'm going to sustain the objection to it's admissibility.
>
> And you have an exception to my ruling.

The foregoing matters were raised on oral argument and in briefs before the Appellate Court, State of Connecticut, emphasizing the deprivation of petitioners' rights to a jury trial, citing relevant cases and authorities, but the trial court's judgment was affirmed without comment. (Plaintiffs' Brief, pp.23,31,32)

A timely motion for reconsideration and reargument was filed in the Appellate Court by petitioners, but it was denied without hearing or comment.

Petitioners then timely filed a petition, for certification to appeal from the Appellate Court's ruling, to The Connecti-

cut Supreme Court, but it was denied.

Finally, petitioners filed a timely motion for reconsideration of the foregoing denial in the Connecticut Supreme Court, which was denied on October 15, 1993.

REASONS FOR GRANTING WRIT

In view of the foregoing evidence, particularly the testimony of petitioners' adversary, there is no doubt but petitioners were deprived of their rights to a jury determination on factual issues. Such basic rights will be scrupulously safeguarded by the Supreme Court. Lyons v. Mutual Benefit Health & Accident Association, 305 U.S. 484, 492, 83 L. Ed. 303, 308, 59 S.Ct. 297, reh. den. 306 U.S. 667, 83 L.Ed. 1062, 59 S.Ct. 459. The Constitution of the State of Connecticut has meanings equivalent to similar provisions in the federal consyitution.

Lubin v. Brown, 169 Conn. 212, 219, 362 A.2d 769, 773 (1975). Litigants may always exercise their constitutional rights to have issues of fact decided by a jury and not by the court. Doyle v. Russell, 5 Conn. App. 480, 481, 489 A.2d 1169 (1985), Tucker v. Halay, 156 Conn. 633, 634, 242 A.2d 730, 732 (1968). Connecticut's like rulings may contain even broader protection of personal rights, State v. Dukes, 209 Conn. 98, 112 (1988). Even had Connecticut no such rule, it is appropriate to look to authorities under the comparable federal rule, Horton v. Meskill, 187 Conn. 187, 192, 445 A.2d 579 (1982).

The trial court created its own pseudo-grounds for suppression of evidence and jury trial rights by:

(1) Imposing an inapplicable burden of proof on the first eight counts of

the complaint, which instead required only a preponderance of evidence test.

(2) Predicating admission of evidence on its own interpretation of the note. Instead, as ruled Daley v. Gaitor, 16 Conn. App. 379, 388-389, 547 A.2d 1375, 1380 (1988), where that court said:

> We have long held that "(t)he interpretation of...contracts, is principally a question of the intention of the parties, a question of fact to be determined by the trier of facts.' Monroe Ready Mix Concrete, Inc. v. Westcor Development Corporation, 183 Conn. 348, 351, 439 A.2d 362 (1981)." Rodziewicz v. Giquere, 5 Conn. App. 293, 295-296, 497 A.2d 1025 (1985). Accordingly we find that the trial court committed plain error in taking this case from the jury's consideration.

At 16 Conn. App. 379, 384, 547 A.2d 1375, 1377-1378, this case also ruled:

> "The general rule in Connecticut is that a trial court should direct a verdict only when a jury could not reason-

> ably and legally have reached any other conclusion. Petyan v. Ellis, 200 Conn. 243, 244, 510 A.2d 1337 (1986). In our review of the trial court's directed verdict in favor of the defendant, we must consider the evidence in the light most favorable to the plaintiffs. Pinto v. Spigner, 163 Conn. 191, 193, 302 A.2d 266 (1972)." Meizoso v. Bajoros, 12 Conn. App. 516, 518, 531 A.2d 943 (1987). In this case we conclude that the trial court committed plain error in directing a verdict for the city.

As ruled in Bent v. Green, 39 Conn. Sup. 416, 420, 466 A.2d 322, 325 (1983):

> Directed verdicts are not favored and should be granted only when a jury could not reasonably and legally reach any other conclusion.

Moreover, Bent v. Green (same cite) rules that the trial court's suppression of expert testimony was improper, saying:

> The general rule is that where the exercise of proper professional skill and care is in issue, expert testimony tending to establish the want of such

> skill and care is essential to recovery (citations omitted). The rationale underlying this rule is that "in most cases the lay person, including the members of the jury and the presiding judge, does not and cannot have the requisite knowledge as to whether proper treatment was given, proper procedure was followed, or proper care was used (citations omitted). (underlining supplied)

Where litigants have been deprived of a fundamental right or the right to a fair trial a judgment is reversible, even had exceptions had not been taken. Cahill v. Board of Education of the City of Stamford, 187 Conn. 94, 100, 444 A.2d 907, 911 (1982).

CONCLUSION

Wherefore, petitioners respectfully pray that a Writ of Certiorari be granted by this Honorable Court to review the judgment and orders of the courts below.

APPENDIX

GERMANE PORTIONS OF TRIAL COURT'S OPINION AND ORDER UPON RENDERING JUDGMENT

And so in affect I am directing a verdict in this case in favor of the defendant and that would mean that it would not be necessary for you(the jury) to decide this matter. Transcript, January 15, 1992, p.117.

At this point I'm not going to go into details as to why I directed you to render the verdict as you just did so. But, I can only tell you that's an issue --a legal question that will have to be addressed by the attorneys and the court itself. And that really was something other than a question of fact for the jury. Transcript, January 15, 1992, p.120.

APPELLATE COURT--STATE OF CONNECTICUT

Katherine G. Ivimey, et al.

No. 11074

v.

May 25, 1993

American Bank of Connecticut

Action to recover damages for the alleged fraud in the computation of interest charged pursuant to a mortgage note, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before Zoarski, J.; directed verdict and judgment for the defendant, from which the plaintiffs appealed to this court. Affirmed.

APPELLATE COURT--STATE OF CONNECTICUT

Katherine G. Ivimey, et al.

No. 11074

v.

June 23, 1993

American Bank of Connecticut

ORDER

THE MOTION OF THE PLAINTIFF, FILED

JUNE 4, 1993, FOR REARGUMENT AND RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

NOTICE SENT: 6/30/93

SUPREME COURT--STATE OF CONNECTICUT

Katherine G. Ivimey et al.

v. NO. PSC-93-0122

American Bank of Connecticut

ORDER ON PETITION FOR
CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiffs Katherine G. Ivimey and John R. Ivimey, Sr. for certification to appeal from the Appellate Court (31 Conn. App. 921 (AC 11074), it is hereby ordered that said petition be, and the same is hereby denied.

Dated: September 15, 1993
Notice sent: 9/16/93

SUPREME COURT--STATE OF CONNECTICUT

Katherine G. Ivimey et al.

NO. AC 11074

v.

PSC-93-0122

American Bank of Connecticut

ORDER

THE MOTION OF THE PLAINTIFFS, FILED SEPTEMBER 27, 1993, FOR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

OCTOBER 15, 1993
NOTICE SENT: 10/15/93

JUDGMENT SOUGHT TO BE REVIEWED

CV 85 74484 STATE OF CONNECTICUT

KATHERINE G. IVIMEY, and
John R. Ivimey, Sr.,
of 45 Kasson Road
Bethlehem, Connecticut — SUPERIOR CT.
J.D.WATERBURY

v. — AT WATERBURY

AMERICAN BANK OF CONNECTICUT,
of Two West Main Street
Waterbury, Connecticut — JAN. 15, 1992

Present: Hon. Howard F. Zoarski, Judge

JUDGMENT

This action, by writ and complaint, claiming damages and other remedies, came to this Court on December 17, 1985, and thence tolater dates when the parties appeared and were at issue, as on file, and when the plaintiffs having submitted their evidence and defendant having moved for a directed verdict, the Court ordered the jury to bring in a directed verdict for defendant, and the Court accepted that verdict as to all counts of the complaint, on January 15, 1992.

Whereupon it is ordered that a directed verdict in favor of the defendant is adjudged and entered for defendant.

Respectfully submitted,

John R. Ivimey, Sr.

Katherine G. Ivimey